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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 668

AMPLEX OF MARYLAND, INC.,
Petitioners

v.

OUTBOARD MARINE CORPORATION,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

OPINIONS BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTES INVOLVED 3
STATEMENT 4
REASONS FOR GRANTING THE WRIT 10
CONCLUSION 26
Appendix A—Opinion of the Court of Appeals A-1
Appendix B—Judgment of the District Court B-1

TABLE OF CASES

A. C. Becken v. Gemex Corp.,
272 F.2d 1 (1959) 20, 22

American Tobacco Co. v. United States,
327 U.S. 781 (1946) 20

Brown Shoe Co. v. United States,
370 U.S. 294 21

Continental Ore Co. v. Union Carbide and
Carbon Corp., 370 U.S. 690 24

FTC v. Procter & Gamble Co.,
386 U.S. 568 11

Jerke v. Delmont State Bank,
54 S.D. 446, 223 S.W. 585 24

Osborn v. Sinclair Refining Co., 287 F.2d 832
(4th Cir., 1960) and 324 F.2d 566 (4th Cir., 1963) 20, 22

Poller v. Columbia Broadcasting Co.,
368 U.S. 464 24

Standard Oil Co. of California v. United States,
337 U.S. 293 . . . . . 20, 21

United States v. Aluminum Co. of America, *et al.*,
148 F.2d 416 (2d Cir., 1945) 18, 22

United States v. Colgate, 250 U.S. 19 22

United States v. Griffith, 334 U.S. 100 20

United States v. Philadelphia National Bank, 374 U.S. 321, 364 19

STATUTES INVOLVED

Clayton Act, 38 Stat. 731, 15 U.S.C. 15 ..... 2, 3, 4, 20

Sherman Act, 50 Stat. 693, 15 U.S.C. 1 ..... 2, 3, 20, 22, 23

OTHER REFERENCES

American Industry: Structure, Conduct, Performance 103 (1964), Caves 15

Antitrust Policy 63 (1959), Kaysen and Turner 15

Barriers to New Competition 114 (1956), Joe S. Bain 11, 12

Industrial Organization 210 (1959), Joe S. Bain 11, 12

Moore's Federal Practice (3d ed.) Vol. 9, Sec. 2495 24

Oligopoly Power under the Sherman and Clayton Acts–From Economic Theory to Legal Policy, 19 Stanford Law Review 285 (Jan. 1967) 18

Statistical Abstract of the United States 830 10

Structure of Food Manufacturing 202-207 (1966), Technical Study No. 8, National Commission on Food Marketing 18

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The plaintiff, Amplex of Maryland, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 1, 1967.

OPINIONS BELOW

The opinion of the court of appeals, (App. A, infra, A-1) is reported at __ F.2d __. The opinion of the District Court is unreported.

JURISDICTION

The judgment of the Court below (Appendix B, infra, B-1) was entered on June 1, 1967.

A timely Petition for Rehearing was denied on July 14, 1967. The jurisdiction of this Court is invoked under 28 U.S. Code Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether it is a violation of Sections 1 or 2 of the Sherman Act or Section 3 of the Clayton Act for a manufacturer to cancel the franchises of dealers who refuse to stop selling the products of competing manufacturers, where the effect of those cancellations is to:

a. Preserve the manufacturer's approximately 60% share of its national market;

b. Exclude competing manufacturers from approximately 8,700 (or some 58% to 72%) of the estimated 12,000 to 15,000 retail outlets in the country, these being the largest and most efficient dealers, thus stifling the growth of existing competitors and creating severe cost and price barriers against the entry of new manufacturers;

c. Reproduce that same noncompetitive market structure at the dealer level in virtually every local market in the United States;

d. Ruin the larger dealers who attempt to sell a competing product, and restrict the freedom and business opportunities of those that acquiesce; and

e. Impose on the consuming public a supercompetitive price for the product, one that exceeds the level that would be expected to prevail in an effectively competitive market by perhaps as much as 15%.

2. Whether the trial court in an antitrust case on its own motion, having heard the testimony of five (5) of the plaintiff's witnesses, and having then implied that it was going to

dismiss the case and having stated that it would require the plaintiff to make a proffer of proof as to its remaining evidence (including a proffer as to what its remaining forty-two (42) witnesses would testify to, if called), and having then rendered judgment against the plaintiff after hearing the proffer, has in fact used a "summary procedure" under which the plaintiff is entitled to have its proffered evidence accepted as true, including all favorable inferences (as the district court itself conceded here) or whether the procedure employed was analogous to a full trial on the merits, in which, as the court of appeals held here, the district court was entitled to "weigh and reject that proffered evidence and make "findings" wholly inconsistent with it;

STATUTES INVOLVED

Section 1 of the Sherman Act, 50 Stat. 693, 15 U.S.C. 1, provides in pertinent part as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of the trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 2, provides in part as follows:

> Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . .

Section 3 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 14, provides in part as follows:

> Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies,

> or other commodities . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 15, provides in part as follows:

> Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

The plaintiff, Amplex of Maryland, Inc., located on Ritchie Highway, at Arnold, Maryland (near Annapolis) was a franchised marine dealer of Johnson Motors, a wholly owned subsidiary of the Outboard Marine Corporation, and was such for a period of some sixteen (16) months, from April of 1960 to the end of September 1961. In that period of time, the plaintiff became the largest purchaser of the defendant's engines in the State of Maryland, exceeding the purchases of defendant's second best customer in Maryland, Jenkins Marine, an Evinrude dealer,[1] by some 40% in 1961

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[1] The defendant, Outboard Marine Corporation, is the largest manufacturer of outboard motors in the United States; its brand names being the "Johnson," the "Evinrude," and the "Gale." These three brands are, or were, produced and sold by three separate divisions within the Outboard Marine corporate structure. As discussed more

(194 engines, for $85,000, compared to 177 engines for $60,048.00). All engines were sold by the Defendant on sight draft bill of lading.

On or about June 25, 1961, approximately three (3) months before the termination of its franchise, plaintiff acquired a small building (previously a Carvel frozen custard establishment) across the highway from its Outbaord Marine ("Johnson") dealership, and after having received its full inventory of just 12 Mercury engines on consignment,[2] commenced selling these engines from that second establishment. This new Mercury outlet was operated under a different trade name, Arundel Marine. Less than a week after opening this new place of business, on July 1, 1961, plaintiff received a telephone call from one of defendant's sales representatives, accusing plaintiff of being the owner of the competing Mercury establishment across the highway. Defendant's salesman said he was coming down to "investigate."

Upon arrival several weeks later, the defendant's sales representative, a Mr. Schiavina, in a heated discussion, informed plaintiff's president, a Mr. Nicholas Canzona, that unless he would agree to rid himself of the Mercury establishment across the highway, his Johnson franchise would not be renewed. This threat was made in the presence of four (4) other witnesses. Plaintiff refused to give up its Mercury business and, when the Johnson franchise expired on Septem-

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fully below, the "Johnson" and "Evinrude" engines are considered premium products and sell for considerably higher prices than the "Gale" engine, even though all three are technically identical (the only difference being in their covers or hoods, and in their paint jobs). The latter brand, the "Gale" (which, since 1963, is no longer produced) was primarily a "private brand" product (sold largely through Montgomery Ward under the latter's own private brand name), and was not included in the defendant's exclusive dealing activities described herein.

[2]Compared to the defendant's policy of cash on delivery. The defendant's engines are in such demand that it need not concern itself with credit terms or consignment arrangements. This is left to those manufacturers attempting to compete with the defendant.

ber 30, 1961 (defendant's contracts with its dealers expire automatically, as well as being cancellable upon 30 days notice, and hence must be affirmatively renewed at the end of each fiscal year), defendant refused to renew it. Plaintiff's business promptly collapsed with the withdrawal of the "Johnson" franchise and, in due course, this suit was filed by plaintiff seeking re-instatement as a Johnson dealer and damages under the Sherman Act for the business losses suffered since the cancellation.

Plaintiff presented the testimony of five (5) of its witnesses before being informed in effect by the district court that it was about to dismiss the case and that plaintiff must present the remainder of its evidence in the form of a proffer. Included in the testimony already received was that of plaintiff's president that, as a condition to his original enfranchisement as one of the defendant's dealers in April of 1960, he had been required to agree to "phase out" the competing line of outboard motors (the "Scott-Atwater" engine, manufactured by McCulloch Corporation) he had been handling since 1958. This was corroborated by the testimony of the Outboard Marine sales representative that he had in fact exacted such a condition or promise from the plaintiff (Amplex, in the spring of 1961, had virtually stopped purchasing Scott engines and gradually "phased out" its Scott inventory).

That salesman had testified further that the plaintiff was merely an "example" of the way he had effected an exclusive dealing policy among Johnson dealers. As he explained it in his testimony, the defendant Outboard Marine had followed a definite exclusive dealing policy up until 1956;[3] that this policy was changed "for a year or two" thereafter;

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[3]Litigation between defendant and the Federal Trade Commission ended with the entry of a cease and desist order directing the company to cease its exclusive dealing on June 27, 1956. *In re Outboard Marine Company,* Dkt. 5882, 52 FTC 1553 (June 27, 1956). The district court excluded any reference to the Commission's findings and orders in this proceeding.

that, within a period of some two years, an "unofficial policy" of exclusive dealing came into being, this policy being one that, while not "discussed" by the salesmen with their superiors, was "understood" by all concerned; and that he had personally recommended cancellation of a number of dealer franchises for the sole reason that the dealer refused to give up a competing line of outboard engines, PA63.[4] (The testimony further established that the recommendations of the district representative were almost invariably followed by the company. Mr. Schavina testified that every recommendation, without exception, made by him relating to the creation of new dealers or cancellation of existing dealers, was followed by the defendant.) Further evidence of similar practices by other Outboard Marine salesmen was presented or proffered. Thus, when plaintiff Amplex's franchise was cancelled, the local dealer it was given to (Nate Gates, located in Edgewater, Maryland, less than 10 miles away), was noted on a report filed by defendant's salesman with his home office as having indicated he would cease handling the Mercury engines within a year. OxEx 47, A148. Sixteen months later, he no longer sold Mercury engines. More evidence of this same type, including, for example,

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[4] A64-65. (This testimony was improperly excluded by the district court.) The written franchise agreements themselves contain no prohibition against "dual dealing" and, in fact, defendant Outboard, in an apparent effort to establish at least ostensible compliance with the 1956 Federal Trace Commission cease and desist order mentioned above, subsequently published and circulated to its dealers and salesmen a policy statement (Dx Ex. 8 & 9, A142) that no dealer would be terminated or otherwise discriminated against for handling competing engines. Canzona believed the potential sanctions of the FTC cease and desist order would be enough to deter the defendant from actually cancelling a dealership as large and valuable as his own, i.e., he believed defendant's salesman was bluffing when he threatened Amplex with cancellation unless it got rid of Mercury. Had he known defendant's salesman was not bluffing—that the company does not in fact feel deterred in this regard by the FTC order—he would have of course given up the less valuable Mercury line when ordered to do so.

threats of cancellation for "dual dealing" by defendant's salesmen in Philadelphia and in Falls, Oklahoma, was included in the proffer submitted to the district court, A98-117. Although unrebutted, all of this evidence was ignored by the district court, and the court of appeals erroneously concluded that the plaintiff had proved only a "single instance" of exclusive dealing, namely, its own cancellation, for refusing to adhere to such an agreement. The ultimate effect on Mercury and Scott in the Maryland area is that they have been excluded from any significant share of the local market and all outlets of any consequence are now controlled by the Defendant. PA116-117.

Evidence was also received or proffered to show the following. Outboard Marine is the largest manufacturer of outboard motors in the United States, its "Johnson," "Evinrude," and "Gale" brands accounting for approximately 60% of the national outboard motor market in 1961.[5] The rest of the market is shared by eleven (11) other manufacturers, the largest of which are believed to be the Kiekhaefer Corporation (now a part of Brunswick), maker of the "Mercury" outboard motor and the McCulloch Corporation, maker of the "Scott-Atwater" engine.[6] There were an estimated 12,000 to 15,000 marine dealers in the United States in

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[5] An estimated 343,000 outboard motors were sold in 1961, for a total retail dollar volume of $155 million. This represented a wholesale (manufacturer to dealer) sales volume of approximately $108.5 million, of which defendant accounted for $64,984,166 (in units 198,186 engines).

[6] No data is available here as to the relative market shares of these other firms, except the testimony of plaintiff's president that only the defendant's brands, plus the Mercury, the Scott, and the West Bend, were of any significance in the major marine market involved here, the Baltimore metropolitan area, and proffered evidence that the Scott is no longer an effective competitive force in the eastern market. (With the exception of possibly one other manufacturer (West Bend), the remaining eight competitors produced only specialty engines or offered engines with only a limited range of horsepower.)

1961; of these, approximately 8,700 (from 58% to 72%) were Outboard Marine dealers. And the overwhelming majority of those 8,700 dealers handled Outboard Marine engines exclusively, the only exceptions being those dealers that, owing to their peculiar geographic location and the like (*e.g.*, dealers in sparsely populated rural communities), could not be replaced at all and hence had to be tolerated in their "divided loyalties," as defendant's salesmen put it. These Outboard Marine dealers are invariably the largest and most influential in their respective communities. By excluding competing engines from the showrooms of these dealers, defendant's salesmen increase their own sales in their own various local territories and correspondingly decrease their competitors' sales. (The salesman's annual bonus is greatly dependent on his sales performance. Further, the salesman is subject to constant pressure by the defendant to increase sales.) As a former Outboard Marine salesman testified:

> THE COURT: I gather what you are saying is that if you could drive competing lines of merchandising out of the hands of dealers, then the ability to sell Johnson motors would thereby be increased.
>
> THE WITNESS: That is correct.[7]

A written report to the home office by one of its salesmen expressed the competitive impact of allowing dealers to handle more than one producer's engines this way: "He's been handling Merc (Mercury engines) on a direct basis, which I feel is substantially responsible for his nearly fifty percent decrease this year with us (Johnson). This boy should have gone at least seventy-five Johnsons this year."[8]

There is no question of fact as to why Outboard refused to renew the franchise of Amplex. Nor is there any issue of fact concerning the percentage of the market enjoyed by Outboard. The district court as well as the court of appeals accepted, for the purpose of rendering their decision, that Am-

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[7] A70.

[8] Dx 7. Tr. 290.

plex's franchise was terminated only because it began to sell Mercury and, further, that Outboard's market share was 60%.

REASONS FOR GRANTING THE WRIT

1. While the industry involved here is of modest size (the sale of outboard motors totalled, as noted, $155 million in 1961), the public interest in the issues involved is much larger. Exclusive dealing arrangements of this type are fairly common in large segments of the economy. Of the nation's approximately five (5) million business enterprises, some two (2) million are retailers. And a very substantial number of them—including, for example, approximately 200,000 gasoline service stations and more than 30,000 franchised automobile dealers[9]—deal exclusively or primarily the products of a single supplier, generally under some kind of franchise arrangement. The decision of the court of appeals in this case that a dominant manufacturer, one with 60% of its national market, one protected from effective actual and potential competition at its own manufacturing level by a barrier (product differentiation) that permits it to charge a substantially higher price than can be gotten by others for products of comparable quality, can lawfully cut off dealers who refuse to enter into exclusive dealing agreements, cannot help but adversely affect the whole climate in which this large and important segment of the country's small business community operates.

2. The injury that this defendant's exclusive dealing policy does to that part of the consuming public that buys outboard motors is substantial.[10] By systematically preventing

[9] Statistical Abstract of the United States 830 (1965) (1963 figures).

[10] The plaintiff does not press its contention, advanced below, that the exclusive dealing involved here is a *"per se"* antitrust offense. It concedes that proof of actual or probable injury to competition and to the public interest is a part of its burden, and believes that it has in fact carried that burden, particularly in its proffered evidence.

its competitors from getting their engines into the showrooms of a majority of the country's marine dealers (as noted, some 8,700 of the nation's 12,000 to 15,000 marine dealers are defendant's dealers, and virtually none of these—except for the few that are located in small rural communities—are allowed to handle competing engines), defendant Outboard Marine not only maintains its dominant market share (some 60% of all outboard motor sales) in the short run, but prevents those competitors from developing the kind of "consumer acceptance" that would be expected to make them effective competitors in the future. In economic terms, defendant's 60% market share is the result of a phenomena called "product differentiation," [11] a setting apart of a product in the minds of consumers in such a manner that it thereafter enjoys a price (or promotional cost) advantage over competing products—here, a conviction on the part of some 60% of the country's users of outboard motors that Outboard Marine's "Johnson" and "Evinrude" engines are "worth" a price that is some 15% higher than even defendant's own "Gale" engine, a motor that was in fact technically identical to its Johnsons and Evinrudes (the only differences being in their "hoods" or covers, and in their paint jobs).[12] That "product differentiation" advan-

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[11] See generally *Federal Trade Commission v. Procter & Gamble Company*, 386 U.S. 568; Joe S. Bain, *Barriers to New Competition* 114 (1956), and *Industrial Organization* 210 (1959).

[12] Tr. 346—Testimony of Robert Brosseau:

Q: Would you describe what technical differences, if any, there are between a Johnson and an Evinrude engine?

A: Between Johnson and Evinrude?

Q: Yes, sir.

A: None, sir.

Q: Between Johnson and Gale?

A: None, sir.

Q: Is there any difference at all between a Johnson and a Gale engine?

A: The shrouds and the paint job.

tage, in turn, is a creature of defendant's exclusive dealing policy. Outboard motors have all of the underlying characteristics that permit successful product differentiation.[13] They are relatively durable, expensive items, purchased at relatively infrequent intervals (although defendant is having considerable success in introducing the "annual model change" to outboard motorists). They are also mechanically complex pieces of machinery that the average user finds extremely difficult to evaluate accurately, a factor that tends to produce heavy reliance on the "reputation" of the manufacturers of the equipment and their dealers. This complex machinery also requires frequent repair work and servicing, another factor that tends to differentiate the product of the manufacturer with the superior dealers. Finally, there are obviously "conspicuous consumption" motives involved in the purchase of outboard motors, as evidenced by defendant's success, already mentioned, in selling the outboard motorist on the idea of the "annual model change." The most "popular" engine, the one displayed in the largest number of dealer showrooms, particularly the one displayed in the showrooms of the biggest and "best" dealers, thus tends to perpetuate its aura of superiority in the minds of the consuming public.

This "product differentiation" barrier that permits Outboard Marine to charge its dealers some 15% more for Johnson and Evinrude engines than for the technically identical Gale engine could not be maintained without the exclusive dealing arrangements it has with its some 8,700 dealers. There is no serious dispute here that this exclusive dealing policy has the straight-forward effect of enhancing the sales volume (and market share) of the defendant and shrinking

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. Q: Excuse me?

A: The shrouds, which would be the hood cover or the engine cover itself, called the shroud, and the paint job, and that's about it.

[13] See generally Bain, note 11, *supra*.

that of its competitors. If a Johnson dealer takes on Mercury engines as a second line, his sale of Mercury engines increases and his sale of Johnson engines falls.[14] Repeated across the nation, this would mean a sharp re-aligning of market shares in the industry. If this plaintiff and the defendant's other 8,700 marine dealers throughout the country were permitted to display competing engines—the Mercury, the Scott, the West Bend, and others—in their larger, more attractive, higher-traffic showrooms, defendant's "product differentiation" advantage and its present 60% share of the national market in outboard motors would obviously start to dwindle and that of its competitors (both individually and collectively) would correspondingly start to increase. With their fixed costs spread over larger volumes of production and distribution, per-unit costs of those competing manufacturers would be expected to fall and, with more nearly equal market shares among the industry's 12 already established manufacturers in 1961,[15] plus potential entry by newcomers that could be expected to find the industry more attractive in this improved climate, the vigor of competition at the manufacturing level should be enhanced. Lower costs and enhanced competition would be expected to lower the price from the manufacturer to the dealer, eventually eliminating most, if not all, of the 15% "premium" price defendant is now able to charge for the Johnson and Evinrude brands. Competition should also be enhanced at the dealer level, thus assuring the passing on to the consumer of those lower manufacturing costs and prices. Thus a 15% reduction in the price of the average outboard motor ($458, in 1961) would be approximately $69 per engine, or a total saving to the American consumer of some $23 million on the $155 million "worth" of outboard motors bought by the consuming public in 1961.

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[14] See e.g. notes 7 and 8, *supra*.

[15] As previously noted, only two or three of these eleven competitors carried a full horsepower line of engines.

The defendant Outboard Marine understands all of this only too well; it has no desire to take the "supermarket test," to see if its engines can still command a "premium" price, and continue to hold 60% of the national market, if they were displayed alongside the motors of its competitors, in the same dealer showrooms across the country, by dealers that would no longer have an incentive to exaggerate their merits to consumers at the expense of competing engines, and thus subject them to meaningful price and quality comparisons by a better-informed consuming public.[16]

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[16]This defendant's concern with preventing consumers from "shopping"—from attempting to get a better bargain—is illustrated by the argument of defendant's counsel to the district court that a dealer's handling of more than one line of competing merchandise "creates confusion in the mind of the customer. If the customer sees two products, he may not be able to decide between them and he may walk out without buying anything." Tr. 32. This is of course economic nonsense; supermarkets carry some 9,000 separate items on their shelves, often as many as a dozen directly competing brands of the same product. Indeed, the "supermarket principle" is at the core of this case: the plaintiff believes that outboard motors, being no longer a "luxury" item for the wealthy but a product purchased by a much broader spectrum of the public today (the largest single category of purchasers is the skilled worker, who bought 28% of all outboard motors sold in 1961), should be merchandised accordingly, with large showrooms, mass displays and the like, whereas defendant clings to the concept of the single-line "specialty" store. Thus, when defendant's salesman confronted plaintiff's president, Canzona, in his place of business on July 20, 1961, and gave him the ultimatum of giving up the competing Mercury engine or losing his Johnson franchise, Canzona tried to explain "that department stores, that automobile showrooms, more enlightened industries, perhaps (now) tended to group their stores together in shopping areas in order to attract more traffic for everyone. He did not accept these arguments. . ." Tr. 141-142.

3. While defendant's ability to charge a monopoly price over a long period of years[17] is the most direct and obvious proof of its possession and exercise of monopoly power, similar proof is inherent in its successful exclusion of competing manufacturers from the major retail outlets. The kind of exclusive dealing involved here would be impossible in a competitively-structured industry, i.e., one with only moderate degrees of market concentration, product differentiation, and barriers to entry.[18] The very essence of effective competition is the availability of acceptable "substitutes" (from competing firms) for the alleged monopoly product,

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[17]In the ten year period 1952-1961, the defendant Outboard Marine Corporation had net (after tax) earnings ranging from a "low" of 12.4% on stockholders' equity (excluding the recession year, 1961, when "only" 5.5% was earned) to a high of 27.3% in 1955. Outboard Marine *Annual Report* 18-19 (1961). Px Ex 76 Tr. 628. The ten year *average* was 17.4%, a monopoly return by any standard. "[F]or the private sector of the economy the range of 5 to 6 per cent would seem about appropriate. This, then, is the opportunity cost of equity capital, the minimum normal rate of profit, based on what it could earn in other uses." Caves, *American Industry: Structure, Conduct, Performance* 103 (1964). See also Kaysen and Turner, *Antitrust Policy* 63 (1959): "If normal profits are of the magnitude of say, 6 to 8 per cent on invested capital, an average profit rate of 9 percent over ten years could not be identified as supernormal with any confidence, but one of 12 percent should." In dollars, this defendant's net (after tax) profits have totalled $84 million in that ten year period, or some $8.4 million per year. At a competitive rate of return (e.g., 8%) rather than the 17.4% it has in fact averaged, its aggregate dollar earnings over that period would have been just under half that total, some $40 million (or $4 million per year). Therefore, even ignoring the inflated costs that monopoly generally produces and doubtless has produced here as well (e.g., the small scale production and inefficient dealer-distribution systems defendant has imposed on the industry), at least $4 million per year in monopoly profits are readily identifiable here, money wrongfully extracted from the dealers in the first instance and, ultimately, from the consuming public.

[18]See generally Bain, note 11, *supra*.

other products serving the same needs and wants that the consuming public can and will turn to if the price of the product in question is raised above a competitive level. Here there are no effective substitutes, as far as the buying public is concerned, for the "Johnson" and "Evinrude" brands of outboard motors sold by this defendant, Outboard Marine. As the facts of this case so vividly illustrate, the dealer confronted with the choice of giving up his Johnson or Evinrude franchise, on the one hand, and whatever "second line" or lines he may be handling, on the other, in fact has no economically meaningful choice to make: the vast majority of purchasers of outboard motors do not regard those competing engines as satisfactory "substitutes" for the defendant's two "premium" brands and will therefore transfer their patronage to some other dealer if he ceases to handle them.[19] Thus it is this absence of effective substitutes—of competing brands of outboard motors that consumers are willing to accept on equally favorable terms (price and volume) to the dealer—that makes possible this defendant's exclusive dealing policy. If there were such effective substitutes—if, for example, none of the 12 manufacturers in this industry commanded more than a proportionate share of consumer attachments (*e.g.*, 8% of the market)—coercion of the dealers would be impossible; confronted with the choice of giving up 11 other brands (some 92% of his sales) or that of the manufacturer that tried to insist on "exclusive dealing," the dealer would of course unhesitatingly give up the latter's brand. Here, it is Outboard Marine's power over the consumers' minds—its power to take away at least 60% of a dealer's business by transferring its name from his door to

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[19] Thus it was proffered that a Mr. George Etzel of Baltimore, a consumer witness (Mr. Etzel is a successful insurance broker), would testify if called that he had formerly been a customer of the Plaintiff but that "he would never again purchase an outboard motor from Amplex because he would not buy any engine other than a Johnson." A107.

another dealer's door—that shows the presence and the exercise of monopoly power.[20]

It is this factor that suggests the economically appropriate standard for evaluating exclusive dealing programs. Where an industry is competitively structured—where there are substantial numbers of competitors, offering products of reasonably comparable acceptability to consumer, with reasonably easy entry—an exclusive dealing policy by one of those relatively small firms would probably have little or no adverse effect on competition at either the manufacturing or distributing levels. Dealers would still have numerous alternatives to turn to for equally saleable supplies; other manufac-

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[20]There was also uncontradicted testimony that the retail sale of other marine products and accessories to consumers—boats, trailers, and the like—are "tied" to the sale of motors, that a marine dealer's overall sales volume in all of these products is dependent in large measure on the kind of outboard motors he sells. A "Johnson" or "Evinrude" franchise generates a large volume of consumer traffic for a dealer's store and thus promotes the sale of those other products as well. Accordingly, manufacturers of those other products—particularly the manufacturers of the more popular brand boats—prefer to have them sold by "Johnson" and "Evinrude" dealers. With overall sales volume tied to the brand of motor handled by a dealer, the loss of a "Johnson" or "Evinrude" franchise thus impairs not just his sales and profits on the engines themselves but on his entire business. (In 1961, Amplex purchased $85,458 worth of engines. Its gross sales were $415,000.00.) In fact, there is uncontradicted testimony that the loss of a "Johnson" or "Evinrude" franchise typically results in business failure for a dealer. The large sales volume (in both engines and other products) generated by the enormous public acceptance of those brands inevitably creates large fixed or overhead costs that cannot be readily contracted when the franchise is withdrawn and sales volume starts to dwindle. And of course no competing engine can generate the kind of sales volume required to support an establishment of the kind and size typically developed by the successful "Johnson" or "Evinrude" dealer. The result, as here, is almost always virtual business failure.

turers, though barred from one relatively small dealer's showroom in each community, would still have access to numerous other outlets of equal size and efficiency in that area.[21] Exclusive dealing, being harmful to competition only when it springs from an industry that is not competitively structured, should thus be evaluated on the basis of whether the industry that practices it is or is not so structured.[22]

4. Exclusive dealing having been used in this case to effect and preserve a virtual monopoly—a 60% share[23] of a

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[21] This presupposes, of course, a community of sufficient size and density to support several dealers of efficient size in competition with each other. In smaller communities, particularly those too small to support more than a single dealer, an exclusive dealing policy (which necessarily includes a refusal to sell to the department stores and other such mass marketers) virtually bars all but the single most "popular" brand from any representation at all in that area. (Use of less-than-optimum size dealers implies higher per-unit marketing costs and thus an equivalent lessening of capacity to offer effective competition to the most popular brand.)

[22] See generally Brodley "Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy," 19 *Stanford Law Review* 285 (January 1967).

[23] Recent economic studies show that monopoly power—the power to exclude competitors or to set noncompetitive prices—begins at a much lower range than the "sixty or sixty-four percent" market share considered "doubtful" in Judge Hand's famous dicta in *United States v. Aluminum Co. of America et al.*, 148 F.2d 416. Thus it was recently found that the profits of food manufacturers tended to be approximately twice as high in industries where the four largest firms held 50% to 65% of the total industry sales as they were in those where the four largest firms had from 35% to 50%. (Where the four largest had 75% or more, average profits rates are higher still—some three times as high as those in the relatively unconcentrated industries.) *Structure of Food Manufacturing*, Technical Study No. 8, National Commission on Food Marketing, 202-207, (1966). As was said in that report: "It appears that profits are particularly sensitive to concentration at levels where four firms account for around 50%.... *Four firm concentration in the immediate range of 50% appears to be*

national market, with the power to exclude competitors from some 58% to 72% of all marine dealer outlets in the country, and the power to charge consumers a monopoly price, one that exceeds a competitive level by perhaps as much as 15%—the economic significance of the case seems well established. And since these plainly undesirable economic results have been achieved by a practice that is fairly widespread in American industry—exclusive dealing—the importance of the legal principles applied here would seem to be equally clear. Certainly the practice is not illegal *per se;* as discussed above, exclusive dealing by a firm with a relatively modest market share (e.g., 5% to 10%) in a competitively structured industry, would be unlikely to have adverse effects on competition at any marketing level and hence would not be unlawful.[24] But where, as here, the injury to the competitive process and to the public interest in competitive prices is so plain, the practice should be condemned under an economically sound application of the "rule of reason," a rule that looks not to form but to substance and condemns those practices that have those socially harmful effects, regardless of how they may be legally clothed. Here, even the forms are satisfied. Monopolization under Section

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a critical degree above which profits are significantly higher and below which they are significantly lower." Id., at 205 (emphasis added). If the power to set noncompetitive prices is significantly present when four firms together control 50% of a market, then *a fortiori* such effects are to be expected when that share is in the hands of a single firm. This conclusion is of course consistent with this Court's holding in *United States v. Philadelphia National Bank,* 374 U.S. 321, 364, that a merger producing a single-firm market share of 30% presents a clear threat of "undue concentration," and the views of the prominent economists mentioned there (374 U.S. at 364, n. 41) that single-firm market shares in the still lower range of 20% to 25% might more realistically mark the point at which undue concentration—significant degrees of monopoly market power—can reasonably be expected.

[24] Plaintiff's counsel, being unfamiliar with antitrust matters, incorrectly argued for a *per se* rule in the courts below; that position is abandoned here.

2 of the Sherman Act is established by the showing that the defendant has both acquired and exercised the power to fix noncompetitive prices and exclude competitors from effective access to the various dealer markets. *United States v. Griffith*, 334 U.S. 100; *American Tobacco Company v. United States*, 327 U.S. 781. Contracts or combinations to restrain trade (*e.g.*, exclude competitors) in violation of Section 1 of the Sherman Act are inherent in defendant's oral understandings with the majority of its 8,700 dealers that they will keep competing outboard motors out of their showrooms (or "phase out" any already on hand); the fact that such oral agreements or understandings exist is established not merely by the handful of cancellations and "phase out" arrangements this plaintiff's meager resources enabled it to prove, but by the reasonable inference that the cancellation of the few that *do* refuse to adhere to such an agreement means that the others, those that have not been cancelled, have *not* so refused and thus are in fact operating under such an express or implied oral agreement. *A. C. Becken v. Gemex Corporation*, 272 F.2d 1 (1959). These same facts also show an unlawful "condition, agreement or understanding" under Section 3 of the Clayton Act.[25] And the possession and exercise of monopoly power (exclusion of competitors or the fixing of a noncompetitive price) that violates Section 2 of the Sherman Act is more than sufficient to show the substantial lessening of competition or tendency to monopoly required under Section 3 of the Clayton Act. *Standard Oil Company of California (Standard Stations) v. United States*, 337 U.S. 293; *Osborn v. Sinclair*, 287 F.2d 832 (4th Cir., 1960) and 324 F.2d 566 (4th Cir., 1963).

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[25]Plaintiff did not invoke this statutory provision below, relying on Sections 1 and 2 of the Sherman Act. However, the court of appeals concluded that Section 3 of the Clayton Act "approaches Plaintiff's grievance more closely than does the statute pleaded," A-7, and plaintiff, being more familiar with the statutes involved at this stage, will take the appropriate steps to amend its complaint to conform to the proof if this Court's disposition of the case permits.

The rulings of the district court and the court of appeals in the instant case is most markedly at odds with this Court's landmark decision on exclusive dealing, the *Standard Stations* case, *supra*. There *Standard Oil* had entered into exclusive dealing contracts with some 6,000 service station operators (16% of the stations in the relevant 7-state market) having annual gasoline sales of $60 million (14% of the gasoline sold at retail in the area). Here, by way of contrast, some 8,700 marine dealers with sales of more than $100 million "worth" of defendant's outboard motors are operating under similar exclusive dealing arrangements. And they account for 58% to 72% of all such retail outlets and some 60% of all sales volume in outboard motors in the nation.

The rulings of the courts below in this case are also inconsistent with the principles established by this Court in the analogous "vertical integration" merger cases, particularly *Brown Shoe Co. v. United States*, 370 U.S. 294. One of the questions involved in that case was whether competition in the manufacture of shoes would probably be lessened by Brown's acquisition of the several hundred retail stores operated by the acquired firm (Kinney), representing less than 2% of the retail shoe stores in the country. The answer of this Court was in the affirmative, that competition would probably be injured by that foreclosure. Here, the foreclosure of 58% to 70% of all marine dealers to competing manufacturers is accomplished by contract, rather than by merger, and hence is ostensibly less "permanent" than the outright ownership of vertical acquisition. The reality, however, is the same; except for those marine dealers that are terminated for dealing in competing engines or for poor performance, defendant's dealers generally remain tied to it for their entire business life. Hence the competitive effects are substantially the same as they would have been if Outboard had bought outright these 8,700 dealers (and continued to buy up any other promising ones that might appear in the future).

The ruling of the court of appeals in the instant case is also, the plaintiff believes, in conflict with its own decision

in *Osborn v. Sinclair, supra.* And it is certainly in conflict with the principle announced by the Seventh Circuit in *A. C. Becken v. Gemex Corporation, supra:*

> "In the case at bar, the clearly established facts show a plan of operation adopted by the defendant, the essential purpose of which was to limit the sale of its products to wholesalers who would agree not to sell below prices stipulated by defendant. Such an agreement is in violation of Section 1 of the Sherman Act. The established facts also show that the refusal to continue plaintiff as a wholesaler of defendant's products was solely because plaintiff would not sell those products according to defendant's existing illegal plan of doing business in violation of Section 1. Plaintiff was not rejected as a customer by defendant because of any other reasons."

Similarly, in the instant case, by the express finding of the court of appeals itself, plaintiff Amplex was cancelled as an Outboard Marine dealer solely because it refused to stop selling a competing product. It was not rejected as a customer for any other reason, and the court of appeals so acknowledges.

The error of the court of appeals here, plaintiff believes, lies primarily in its failure to appreciate the economic significance of this defendant's 60% market share, its power to exclude competitors and fix noncompetitive prices. Failing to understand that to possess monopoly power is to exercise it—that, of necessity, a monopolist can charge only one price, and that whatever price it chooses must by definition be a monopoly price (and always above a competitive price, unless the monopolist is irrational or a philanthropist), that "the power and its exercise must needs coalesce," *United States v. Alcoa,* 148 F.2d 416 (2d Cir. 1945)—the court failed to recognize that this defendant, as a monopolist, has no claim to any of the benefits that firms in more competitively structured industries might be able to claim under *United States v. Colgate*, 250 U.S. 300. "*In the absence of any purpose to create or maintain a monopoly,* the (Sher-

man) act does not restrict the long recognized right of a trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal . . ." (Emphasis added). This defendant fails that first test; it exercises monopoly power on a day-to-day working basis and hence has no right to refuse to deal for the purpose and with the effect of preserving that monopoly power.

6. A significant procedural question is presented here. After hearing five (5) of plaintiff's witnesses, the district court intimated that it was about to dismiss the case and required plaintiff to present the rest of its evidence, including the testimony of forty-two (42) witnesses still to be called, in the form of an offer of proof. This was done. The district court then dismissed the case, rendering its opinion (including "findings") orally from the bench. While the district court specifically acknowledged that it was employing "summary procedures" (which it also acknowledged are to be "most sparingly" used in antitrust cases), A21, and stated no less than eight (8) times in the course of its opinion that it was accepting as proven and true *all* of the plaintiff's uncontradicted evidence, including *all* of its proffer, and was according plaintiff *all* favorable inferences reasonably to be drawn therefrom, the court actually accorded no weight at all to the bulk of that proffered evidence (nor to other uncontradicted evidence as well); the most crucial of the court's conclusions as to the facts—e.g., that only a "single instance" of exclusive dealing had been shown—are wholly inconsistent with that proffered testimony.

Instead of going to the question of whether the district court's fragmentary factual conclusions were "clearly erroneous"—as they patently are—the court of appeals held that the dismissal had not been a "summary procedure" after all, but a trial on the merits in which the district court, as the "unfettered" trier of the facts, was not required to accept that proffered evidence as true, and to accord plaintiff all favorable inferences to be drawn therefrom, but was free to "weigh" and reject it "just as a jury would." A-2.

Aside from the fact that not even a jury is so entirely "unfettered" that it can "arbitrarily or capriciously" disregard "the positive testimony of a disinterested, uncontradicted witness," *Jerke v. Delmont State Bank*, 54 S.D. 446, 223 N.W. 585, quoted 9 *Moore's Federal Practice* Sec. 2495 (3rd ed., 1940), at 309, the reality here is that the district court's ruling in no way involved a "weighing" of plaintiff's evidence, an evaluation of it as to how much was true, how much untrue, or how much was inherently improbable or otherwise deserving of less than full "weight." Rather, the district court, having no appreciation of the economic and legal significance of defendant's 60% market share and thus of the facts recited in the plaintiff's proffer, simply regarded them as largely irrelevant. No serious evaluation of plaintiff's evidence was made by the district court, because it thought that evidence legally insufficient to establish a violation under *any* principle of antitrust law; no serious consideration was given to plaintiff's evidence by the court of appeals, because it erroneously thought the district court had done the "weighing" job the latter expressly conceded it had not done by saying it accepted all of the plaintiff's proffered and uncontradicted evidence. The court of appeals has thus erred, plaintiff believes, in failing to hold that the district court honored in the breach rather than the observance this Court's policy that "summary procedures should be used sparingly in complex antitrust litigation," *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464, ; *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, making findings that were clearly erroneous, and applying an erroneous rule of law to them in summarily dismissing this case.

7. We speak of justice last not because we think it belongs here but because we know this Court hears its cry in more cases than it can possibly heed. The founder of this plaintiff's business, Mr. Nicholas Canzona, is an exceptional man in a number of respects. He holds a degree in chemistry from Johns Hopkins University. He has taught for many years, and continues to teach from time to time, at the United States Naval Academy at Annapolis, his courses in-

cluding English literature, government, economics, European history, and naval history and strategy. He is a Lt. Col. in the Marine Corps, a highly decorated Korean War veteran, and co-author of three (3) books on United States military operations in Korea, these being the official history of Marine Corps participation in Korea. He and his friends, many of them still in the Marine Corps,[26] poured their life's savings into the building of this relatively small retail business. They physically built, with their own hands, their first store and showroom. They employed the latest, most modern techniques in merchandising, including television advertising, the use of a public relations firm, and the concept of the supermarket." Through hard work and intelligent planning, they became the largest marine dealer in the State of Maryland, exceeding Outboard Marine's second largest Maryland dealer by some 40% in 1961. After five (5) years of labor and sacrifice, they had developed their original investment into a very valuable business establishment, one with a net worth of some $100,000, one that returned a net profit of some $21,000 in 1960. Then, on the word of a lowly salesman, a petty tyrant intoxicated with his power to ruin better men than himself, they were wiped out. They did nothing to deserve to be wiped out. They made no business mistakes. They did no wrong. All they did was offend a monopolist, by daring to sell a competing product. We do not have to tell this Court that this is wrong; we do ask, however, for an opportunity to tell the Court that it is not the law, that exclusive dealing is lawful only when engaged in by a competitive firm, in a competitively-structured industry.

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[26] Canzona himself is back in the Marine Corps at the present time, having lost the business he worked so hard to create, his life savings and much of the savings of forty of his friends who invested in this business.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be granted.

David Freishtat
Paul D. Scanlon
Harold Buchman
Attorneys for Petitioners

September 1967.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,671.

Amplex of Maryland, Inc.,
Appellant,

versus

Outboard Marine Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. HARRISON L. WINTER, DISTRICT JUDGE.

(Argued February 8, 1967. Decided June 1, 1967.)

Before SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

David Freishtat for Appellant, and Roberts B. Owen (Nestor S. Foley and Michael P. Bentzen; and Covington & Burling on brief) for Appellee.

ALBERT V. BRYAN, Circuit Judge:

In this antitrust action under § 4 of the Clayton Act, 15 USC 15, Amplex of Maryland, Inc. claimed damages from Outboard Marine Corporation for violating §§ 1 and 2 of the Sherman Act, 15 USC 1 and 2, during 1961 in the sale of outboard motors and related items.[1] The alleged unlawful conduct was the refusal to deal with Amplex as a franchiser so long as it also sold similar products of manufacturers other than Outboard. The complaint charged the breaches were committed by Outboard's engaging "in a combination and conspiracy to restrain interstate trade and commerce and . . . combining and conspiring to monopolize, attempting to monopolize and monopolizing interstate trade and commerce". The District Court dismissed the complaint for failure of proof, and we sustain this judgment.

At the start, it is necessary to understand the order of procedure in the trial court. By agreement trial of the two issues of liability and damages were separated. "The first issue—whether the plaintiff has been 'injured in its business or property by reason of anything forbidden in the antitrust laws'—shall under such agreement be tried first to the Court sitting without a jury (such trial being hereinafter referred to as 'the liability trial')".

Thus the judge became the unfettered trier of the fact. He was entitled to weigh the evidence just as would a jury. The submission was not analogous to a presentation on motions to dismiss, for summary judgment or for a directed

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[1] "§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

"§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

verdict. Hence the Court was not required to view the evidence as it must on motions.

This understanding is important because the appellant refers to the issues as tendered by a motion for summary judgment. Moreover, at times the Court speaks of its willingness to accord favorable inferences to certain parts of the evidence for the plaintiff. Later, it adverts to the summary nature of the disposition of the case. The advertence, however, is to the procedure adopted by the Court, with the acquiescence of the parties, to shorten the trial, rather than to the character of the hearing. After more than four days of testimony, the judge suggested that procedure: that the remainder of the plaintiff's evidence be stated in a proffer. In this the Court would consider the evidence actually adduced and that proffered before taking the later in actual testimony. Under the agreement, upon completion of the plaintiff's proof in this method, the Court declared it insufficient to warrant a recovery.

The findings of fact derived from the proof, with conclusions of law thereon, were stated by the judge from the bench and reported. They were detailed and altogether comprehensive. We think this an adequate compliance with Rule 52(a) Federal Rules of Civil Procedure allowing "an opinion or memorandum of decision" to be filed in lieu of a formal statement of fact findings and legal conclusions.

The facts here, taken from the Court's findings and undisputed circumstances, are these.

1. Plaintiff Amplex since before 1960 operated at Arnold, Maryland, on north Chesapeake Bay, a marine store.

2. In the spring of 1958 it commenced buying Scott-Atwater outboard motors for retail; but Amplex was very desirous to obtain a license to sell the more popular Johnson motors.

Defendant Outboard, a Delaware corporation, was the manufacturer of the Johnson, Evinrude and a model known as the Gale; it had factories and offices in Wisconsin and Illinois as well as other places; as pertinent here, Outboard did business in three divisions, Johnson Motors in Waukegan, Evinrude Motors in Milwaukee and Gale Products Division; the Johnson and Evinrude are similarly priced but the Gale was produced for resale by general stores, under their brand names and at a price lower than the other two; Gale was not manufactured after 1963.

3. In 1957 the Johnson Division promulgated to its sales representatives a statement of policy in respect to the awarding or maintaining of dealerships; relevant here is the instruction that no dealer in Johnson motors should be refused, or any dealership cancelled, because the dealer desired to undertake a competing line of engines; and this policy was subsistent throughout the times of this case.

4. About April 1960 the Johnson Division granted a dealership to Amplex, which commenced the sale of Johnson motors in May; it was evidenced by a written agreement expiring on September 30, 1960 or upon 30 days notice by either party; it contained no provision for renewal and no prohibition upon Amplex's sale of other models.

5. The Johnson Division was aware that Amplex was selling the Scott-Atwater engine under a franchise with its producer; to meet business expansion due to the Johnson dealership, Amplex enlarged its sales facilities at considerable expense.

6. The Outboard motors had a national market in the United States and in Canada; according to its publications, Outboard manufactured and sold more than half, almost 60%, of the total motors sold in the United States and

Canada; from the same source it appears that there were only about 11 other manufacturers in the United States; two of these were Mercury and Scott-Atwater; this was the state of the market in 1960 and 1961; Outboard's sales market in the United States is divided into territories, each in charge of a district representative who supervises the dealer accounts, receives factory orders and recommends the award, refusal or termination of franchises.

7. Upon expiration of the Amplex dealership on September 30, 1960, it was given a new one for the year next ensuing; this again was with the knowledge that Amplex was also selling the Scott-Atwater engines; no renewal provision was embodied in the second agreement, nor was there any prohibition upon the franchiser holding a dealership for another engine.

8. In June 1961 Amplex established a separate business in a small building across the highway from its principal location; it was stocked by the manufacturer of Mercury outboard motors; Amplex operated it under the name of Arundel Marine; in early July the district sales representative of Outboard by telephone and by a personal visit inquired about, and protested, the dealership of Amplex with Mercury.

9. Later, in August or September 1961, this representative advised Amplex that Outboard would not renew its dealership because of Amplex's agency for Mercury; upon termination on September 30, 1961 the Outboard-Amplex dealership was not continued; shortly the same dealership was awarded to Nat Gates and Sons, a similar store not far away, at Edgewater, Maryland; Gates was then selling Mercury engines and continued to do sc until it relinquished the Mercury agency several years afterwards.

10. The reasons given by Outboard for its refusal to extend the Amplex dealership were the squalor and poor organization of Amplex's pace of operation, its failure to give adequate dealer service to purchasers and its poor accounting system.

11. Plaintiff's evidence, adduced and proffered, showed but one refusal by Outboard to deal upon a dealer's failure to drop a competitive line; that was the cancellation, or nonrenewal, of plaintiff's own franchise; there was no evidence that the disenfranchisement of Amplex was held out threateningly as a deterrent to other dealers; there was no evidence of any combination or conspiracy linking Outboard to its competitors or other dealers.

12. Plaintiff's evidence, adduced and proffered, did not disclose any monopolistic position of Outboard, or any attempt, intent or probability of success of any attempt, to monopolize.

I. Plaintiff asserts only the Sherman Act, and if we measured the defendant's conduct by that standard alone dismissal would quickly follow. No combination necessary to a section one prosecution was suggested by the evidence. Fatal to the section two charge was the lack of any evidence of monopolization or its attempt. Even were monopoly power —the ability to fix prices or to exclude competition—inferable from Outboard's manufacture and sale of nearly 60% of the motors of this kind, the proof utterly fails to establish the slightest endeavor to use it. In brief, no violation of the Sherman Act is present.

II. But we choose not to rest on the Sherman Act alone. Although the plaintiff does not invoke § 3 of the Clayton

Act, 15-USC 14[2], it approaches the plaintiff's grievance more closely than does the statute pleaded. As it offers a much broader protection, we now look to it to demonstrate the want of substance in the plaintiff's case under any federal law.

The plaintiff contends, and we paraphrase the Clayton Act § 3, that actually the franchise is an "understanding", "the effect" of which is "to substantially lessen competition or tend to create a monopoly" in outboard motors. But the proof shows no more than a unilateral refusal to sell. Without more, a declination of this kind is not unlawful. This court, on facts not unlike those here, so declared in McElhenny Co. v. Western Auto Supply Co., 269 F2d 332 (4 Cir. 1959). For us Chief Judge Sobeloff stated the proposition altogether clearly, as follows:

> "Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever. Thus, the courts have until now not held a seller liable in damages for refusing to deal with one who is unwilling to enter into

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[2] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condtion, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

an unlawful vertical price agreement or an exclusive dealing arrangement. Clothed with this privilege the seller not only may, but ordinary fairness would require that he should announce in advance the circumstances under which he will do business with others.

"This is not to say however that the course of dealing between seller and buyer may not go beyond mere customer selection and the independent announcement of policy and ripen into an implied or informal agreement or understanding . . . .

. . . . . .

"Neither in terms nor inferentially does the statute [Clayton Act § 3] prohibit a unilateral refusal to sell. Its condemnations are directed against executed transactions of lease, sale or contract containing the forbidden condition, agreement or understanding. Quite correctly the District Court pointed out that a mere refusal by a manufacturer to deal with a retailer who will not confine his dealings to the goods of the manufacturer does not run afoul of the section. The cases are unanimous in this . . . [Citations omitted]." 269 F2d at 337-38.

This proposition has survived constantly without modification since United States v. Colgate and Company, 250 US 300 (1919). See 51 Va. Law Review 687 (1965). Shortly after *McElhenny,* it was again recognized in United States v. Parke, Davis & Co., 362 US 29 (1960), notwithstanding the Court there held that added circumstances of monopolistic, joint or concurring action put the controversy beyond the *Colgate* doctrine.

No such additional circumstance is now present. That its absence destroys the actionability of a refusal to deal was

emphasized in Osborn v. Sinclair Refining Co., 286 F2d 832, 839 (4 Cir. 1960), cert den. 366 US 963, where we said, again by Judge Sobeloff:

> "Even where a manufacturer or supplier has a policy aimed at a result which, if accomplished through an agreement or combination would amount to an unreasonable per se restraint of trade, he nevertheless may, in the absence of such agreement or combination, refuse to deal with a purchaser in accordance with the announced policy. . . ."

Furthermore, contrary to the plaintiff's insistence, we see no resemblance here to a tying arrangement. Cf. Osborn v. Sinclair Refining Co., 324 F2d 566 (4 Cir. 1963). In short, we see nothing unlawful.[3]

We may well conclude this case by quoting the conclusion of the Court in Tampa Electric Co. v. Nashville Coal Co., 365 US 320, 335 (1961):

> "We need not discuss the respondents' further contention that the contract also violates § 1 and § 2 of the Sherman Act, for if it does not fall within the broader proscription of § 3 of the Clayton Act it follows that it is not forbidden by those of the former. [Citation omitted.]"

The District Court's dismissal of the complaint will not be overturned.

Affirmed.

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[3] The plaintiff alleged, but offered no competent proof, that the defendant had entered into "agreements" or "understandings" with dealers to "phase out" the handling of competing products. For that reason we have no occasion to discuss the question of liability, if any, on that score.

RULING FROM THE BENCH

[843] THE COURT: Good afternoon, gentlemen.

Gentlemen, I have been considering your arguments and your briefs also since I recessed this morning, and I have come to some definite conclusions on all aspects of the case except one.

On one aspect of the case, I am going to ask you if you could repeat or perhaps elaborate a bit more on what you argued to me, but I think it only fair before doing that to tell you that much which I consider that I have decided and what my conclusions are and the reasons for the conclusions.

I begin by saying that as I grasp the argument of the plaintiff, both in opening statement and more particularly in what we have been going through today, and as I view the evidence which has been proved in the first five days of hearings, and accepting as proved the evidence which has been proffered this morning, that there are four possible theories on which the plaintiff seeks to recover here.

One of these theories arises under Section 1 of the Act and the other three arise under Section 2 of the Act.

Under Section 1 of the Act, the theory is that there was a conspiracy to create an unreasonable restraint of trade or commerce.

[844] Accepting everything which the plaintiff has proved and proffered in the light most favorable to the plaintiff, I am of the view that the plaintiff can prove no case under this theory because I am of the view that there is no admissible proof of any conspiracy, let alone whether the consequences of the conspiracy would be to create an unreasonable restraint of trade or commerce.

The only evidence that is offered is a species of hearsay evidence, namely, that x would say that Smith had said that Smith went to the home office of the defendant to talk to the defendant about eliminating the

plaintiff as a franchised Johnson dealer, and even this evidence is without any direct proof of whether the defendant proceeded on that basis or proceeded for other reasons not to renew the plaintiff's franchise.

Now, it seems to me if this evidence were to come in, this hearsay evidence to which I have referred, that by reason of the sequence of events, I might be able to infer that this is the reason why the defendant permitted the plaintiff's franchise to expire and affirmatively elected not to renew it, but I think that the point is that the evidence does not constitute any direct evidence or circumstantial evidence of a conspiracy. It is at most, as I termed it before, a species of hearsay evidence.

Once a conspiracy has been proved, I think that [845] hearsay evidence in the form of admissions can be used, that is to say, an admission by a co-conspirator can be attributed to the defendant if the fact admitted was something in furtherance of the conspiracy, but I am not aware of how you can prove the fact of the conspiracy by the hearsay which would be admissible, under the rules of evidence as I understand them, only if the conspiracy is first proved.

So I would rule that as a matter of law on the evidence offered and the evidence proffered that a conspiracy under Section 1 could not be proved.

Under Section 2, the three theories which are advanced here are:

First, that there was an alleged conspiracy to monoplize; secondly, that there was an actual monopolization; and, thirdly, that there was an attempt to monopolize.

To deal with these in the order in which I have named them, what I have said about the Section 1 is equally applicable to the conspiracy to monopolize under Section 2, namely, that there is just no admissible proof which has been offered or proffered to prove a conspiracy between the defendant and anybody else.

To deal then with the second theory under Section 2, which arises under the provision of the Section, the phrase which is "who shall monopolize," I think that

there must be proved two essential elements: First, that the [846] defendant has a monopoly position, and, secondly, that it undertook an act which tends to strengthen that position.

Proof of a monopoly position, as I understand the law, is proof of the power to exclude competition or proof of the power to control prices.

No evidence has been offered of proof of the power to control prices, and I think the evidence is insufficient to show that there was the power to exclude competition. Even if I were to admit the statistical data in the trade publications -- and I might say parenthetically that I still persist in the view that I would have no right to receive that statistical information where on its face it shows that it is based largely, or at least in part, on estimate and that, consequently, I ought not to receive that evidence, if at all, at least until I received evidence on how the estimate was made and the probable degree of accuracy or error.

The fact is that even if I did let it in, it would show at most that the defendant had about fifty-nine per cent of the national market share in the industry relating to the sale of outboard engines and related parts. I still, I think, would have two logical problems or two legal problems, factual problems. They are really both factual and legal problems together.

First of all, I think I would have to define or [847] have defined what is the relevant market. The plaintiff in argument has urged that the relevant market is the national market. I am not certain in my own mind whether I could accept the national market as such, but assuming that I could, I then still have another problem and that is the fact that this national market is made up of the sale of three brands of engines, the Johnson, the Evinrude and the Gale, and the evidence offered to date indicates that while they all compete with one another, Gale perhaps to a lesser extent than the others, the fact is that Johnson and Evinrude directly compete with one another, so whether under these circumstances it is

legally permissible to group the three together and say that by grouping, the defendant has fifty-nine percent of the market, I am not certain, but even assuming that I start with the premise that the defendant has fifty-nine percent of the market share, I still do not think that this proves monopolization because in and of itself, it does not prove the power to exclude competitors and I do not find that the power to exclude competitors or to exclude competition is demonstrated by other proof in this case.

To deal with another element of the theory that a cause of action arises under the "who shall monopolize" language of Section 2, I have the problem of whether there is proof of any act tending to strenghten that position.

[848] Here again, I think that the proof which has been admitted and the proof which has been proffered falls short of what is required to make out a cause of action.

Of course, there is the proof, which I accept for the purposes of this stage of the proceedings, that the plaintiff's franchise was not renewed for the invidious reasons of Mr. Schiavina, namely, that this was done to exclude Mercury as one of the products which the plaintiff handled, but the fact of the matter is that the proof also shows that this franchise which was allowed to expire was in turn awarded to another Mercury dealer in the local area, geographically very close to the plaintiff and one which I think would, of necessity, have to be considered as competing in the trading area or the relevant market of which the plaintiff was a part, even if I assume that the relevant market is much narrower than the national market which the plaintiff urges on me.

Now, there is some proof that this other dealer over a period of time did give up this other franchise, but the fact of the matter is that there is no proof tendered to indicate the reason why he gave up this other franchise.

In short, what I am saying is that the proof shows that the franchise was given to somebody else and the proof fails to show that in giving it to somebody else,

that there was an express or an implied or an oral or a [849] written agreement extracted that the other franchise would be given up, either immediately or at some later date.

This becomes significant because it is admitted that this other dealer, as well as being in the local trading area in which the plaintiff traded, is within this District and is alive and is capable of being served with the process of this Court and brought into Court. The fact that he is not even proffered to be brought into Court, I think must be considered by me as an indication that if brought, he would deny that there was any such arrangement between him and the defendant with reference to giving up this competing line, and certainly if I had that denial, coupled with the fact that he handled a competing line when he was given what used to be the plaintiff's franchise and I have opposed to this proof only Mr. Schiavina's reasons for taking the plaintiff's franchise from him, there is just a lack of sufficient evidence on which I could say that there was an act on the part of the defendant which tended to strengthen that position.

This then brings me, gentlemen, to the third theory of recovery under Section 2 and the fourth overall theory, and that is the question of attempt to monopolize, and it is on that point that I would like to hear you further and in a little bit more detail.

Now, if you are ready to go ahead, I will be [850] glad to have you go ahead. I would prefer, Mr. Owen, Owen, to hear from you first and then to hear from Mr. Freishtat on that point.

Do you want a few minutes' recess to get your notes in order? I am perfectly willing to give it to you.

MR. OWEN: Before we take the recess, if Your Honor please, I wonder -- and I don't mean to be presumptuous but could you indicate in any way your question about the matter?

THE COURT: I can say this, that first of all, I have no question in my mind about the legal standard by which I have got to measure the sufficiency of the proof. I am

satisfied that there must appear evidence of specific intent to monopolize and a dangerous probability of success.

I recognize that the Tidewater case in the Ninth Circuits holds otherwise as to the probable degree of success and I am also aware of the fact that I indicated my own attraction to that doctrine in Campbell vs. Schlitz, but I am perfectly satisfied that that is the law of this Circuit and it is up to me to follow the law of this Circuit unless and until the Court of Appeals for this Circuit changes it."

I am more concerned about the factual aspects and that is the extent to which Mr. Schiavina's motives are chargeable to his employer, particularly if I accept, as I must, the proffered testimony that Mr. Canzona called to the [851] attention of other representatives of Outboard what Schiavina had said and what he was apparently intending to do and on what basis he was intending to do it, as to whether this could mount up to enough proof of specific intent that I ought to go ahead and see the witnesses and judge their credibility and hear whatever defense might be offered.

Then I am concerned also with the sufficiency of the proof to show dangerous possibility of success. Now, here in connection with dangerous possibility of success, I do not think that the proof must show that Outboard occupies a monopoly position as a premise from which to begin.

Query: If it does not occupy a monopoly position and if I have got to accept, as I think I must for this purpose of the case, that it controls about fifty-nine percent of the market, just what is the significance of evidence that Schiavina dealt with Amplex in the way he did, namely, recommended against the renewal of its franchise because it would not give up a competing line and what is the significance of other representatives of the defendant attempting to exert similar pressures on other dealers, the Neptune instance, for example, involving Towers, I think is the name of the dealer in Philadelphia.

MR. FREISHTAT: Johnson and Towers.

THE COURT: Johnson and Towers. I am, of course, aware of the testimony of Wright that with the other [852] Philadelphia dealer, whose name I must confess I have never known, where he tried to get him to give up a competing franchise where he was already a Johnson franchise holder and met with no degree of success, goes against this, but there is proffered testimony that Johnson attempted to exercise some degree of control over other dealers throughout the country. Some of them, of course, may be explained away on the grounds that it is legitimate in dealing with McFadden in Hagerstown to say to a dealer, unless you represent our entire line, we are not going to let you represent any of it, and possibly it is legitimate to say to Jackson in Oklahoma that if you do not carry the full line of parts, you cannot carry our line, but on the others, I would just like to hear your comments a little further.

MR. OWEN: If Your Honor please, I hate to ask this, but would it be possible to take a ten-minute recess to talk with my colleagues and get our thoughts in order?

THE COURT: Certainly, I will be glad to do that.

MR. OWEN: Thank you very much.

THE COURT: I will recess then for ten minutes. If you need more time, Mr. Owen, do not hestitate to take it.

MR. OWEN: Thank you. I do not think we will need it, sir.

(Thereupon, at the conclusion of a short recess, [853] the following proceedings were had:)

THE COURT: Gentlemen.

Are you ready now, Mr. Owen?

MR. OWEN: Yes. Thank you.

THE COURT: I think before you begin, there is one reason which entered into my thinking in connection with the "who shall monopolize" cause of action under Section 2 that I failed to state that I would like to make part of the record and that is this, that on the issue of whether the defendant occupied a monopoly position and more

particularly whether it had the power to exclude competiton, I think it extremely significant that the part of the plaintiff's case already proved and particularly that part through the testimony of Mr. Wright shows that in an attempt to exclude competition in Philadelphia, namely, the Johnson and Towers dealership, that the attempt was unsuccessful.

I suppose it is possible in a given case to prove that a person has the power to exclude competition without undertaking to prove that he in fact excluded competition, but I think when the proof goes beyond that and shows that he attempted to exclude competition and failed to succeed, that that pretty thoroughly negatives the idea that he had the power to exclude competition.

Now, having indulged me to permit me to express that additional argument, I will be glad to hear from you on [854] this other point.

* * *

[870] THE COURT: As I stated before in dealing with this third theory under Section 2 and fourth overall theory, that the defendant is liable as one who attempted to monopolize, the essential proof under the rule is this Circuit, which I think that I must obey, notwithstanding any attractiveness of the doctrine in the Ninth Circuit, is that there be proven a specific intent to monopolize and that there be proven a dangerous possibility of the success of the attempt.

I am satisfied that on the evidence which has been offered now and that which has been proffered, taking it in the light most favorable to the plaintiff, that these elements cannot be established.

I reach this conclusion because I am perfectly satisfied that the dangerous possibility of success of the [871] attempt is not established and cannot be established in this record.

Here, there is no doubt, there is no speculation as to what would be the effect of the defendant's requiring the plaintiff to deal exclusively in Johnson engines because

the proof shows exactly what happened after the plaintiff's franchise was removed from him.

The proof shows that the franchise was given to another dealer in the immediate trading area, who was also a dealer in Mercury engines.

Now, it is true that the proof shows that at some later time, a period of several years, this other dealer ultimately gave up handling Mercury engines the same way the plaintiff gave up handling Mercury engines, yet there is no proof whatsoever that there was any agreement, that there was any understanding or that there was any attempt to extort an agreement or an understanding from Gates, this other dealer, that he give up the Mercury engines at the time that he got the Johnson franchise or that he give them up at any time in the future.

On that state of facts, it seems to me that as a matter of law, it simply cannot be said that a dangerous possibility that Outboard would achieve any success of monopoly position has been shown.

The argument is made to me that this would be a [872] good example for Outboard to cite to its other dealers and after they saw what could happen to Amplex, to exert all sorts of pressures on them not only to carry on exclusive dealing but to carry on the boat line or to carry on whatever the defendant might will, but I think the answer to that is that there is not the slightest proof that this is what is done.

On the element then of attempt to monopolize, namely, that there appear a dangerous probability of success, there just cannot be a case spelled out under the proof which is offered.

I am inclined to the view also that the case would break down on proof of specific intent. Here, I might say that I do not have the same degree of certainty that I have on the dangerous probability of success because I think that circumstantially, it could be argued that Mr. Schiavina had an improper intent and that this intent was attributable to or chargeable to the defendant from the fact that Mr. Schiavina expressed his intent to the Presi-

dent of the plaintiff, as well as others, and that the knowledge that Mr. Schiavina was proceeding on this intent was communicated to other representatives of the defendant in a position superior to that of Mr. Schiavina.

Of course, if the proof came in, that is, if I heard the proof and judged the credibility of the witnesses [873] and more particularly what defense would be offered by the defendant, I think I might well come to the conclusion that not only from the lack of specific evidence of what Mr. Preston and his superiors and associates acted on and what explanation they might give of what they acted on, that I would conclude that specific intent also was not proved, but I am inclined to the view that giving the plaintiff all of the benefits and favorable inferences to which I think it is entitled at this stage of the proceeding, that I would be inclined to say that there was sufficient evidence to require a defense on the item of specific intent, notwithstanding the lack of evidence as to the basis on which Mr. Preston, his superiors and his associates acted; however, in fairness to the defendant and in support of the result overall that the plaintiff has demonstrated an inability to prove an attempt to monopolize under Section 2 of the Act, I think that I should go further and state that to me, it is highly significant that even if I charge Mr. Schiavina with all of the improper motives that I think can be inferred against him and must be inferred against him for the case in the position in which it is, that the fact that he in turn recommended the shift of the Johnson franchise to Gates, who was another Mercury dealer, and coupled with a complete failure of proof or proffered proof that there was any understanding or arrangement or pressure on Gates to give up [874] his Mercury franchise, that this weighs very heavily against saying that Mr. Schiavina had a specific intent to monopolize chargeable, under the theory that I have previously expressed, to the defendant itself.

Of one thing I am certain and that is with a sales organization of the size which the defendant has, namely, 12,-

000 to 15,000 dealers in 1961 and approximately 4,000 less when we get along to 1965, that I am not aware of any case which would say that a single instance of permitting a franchise to expire because of a refusal on the part of the franchise holder to accede to a policy of exclusive dealing, that a single isolated instance in an organization of this magnitude is sufficient to show specific intent on the part of the defendant to achieve a monopoly position or, indeed, to show that if it is done and accomplished in only one out of some 4,000 shifts or changes of franchise, that this shows that there is any dangerous probability of success in the attempt at monopolization.

I think it a fair statement really that on even balance, while I am not as certain and I have rather candidly expressed the bases of my uncertainty, that the proof is insufficient to prove specific intent. On even balance, I am certainly inclined to the view, and so hold, that proof of specific intent on the evidence offered and that proffered would be insufficient to establish the [875] objective sought to be accomplished.

I recognize overall that summary procedures in antitrust cases should be most sparingly applied. It is not any justification for the use of summary procedures that the calendars are congested, that the proof goes slowly, that a trial will be a protracted one, and I wish to state that these are not considerations, that is to say, the length of time for hearing all of the testimony, the fact that there are other cases waiting to be heard, the fact that this case would undoubtedly be protracted if all of the approximately forty additional witnesses proffered by the plaintiff were to be heard and be cross-examined, as well as any proof which might be offered in defense, assuming that a motion was not granted at the end of the plaintiff's case and a defense was to be undertaken.

Rather, I conclude that summary procedures here are proper solely because of the fact that on the basis of the evidence offered up to date and on the basis of the proffered testimony, drawing from it all inferences favor-

able to the plaintiff which can be drawn, that as a matter of law, there just simply is no case under any one of the four theories which have been advanced.

Accordingly, I will direct the Clerk to enter judgment for the defendant.

MR. FREISHTAT: For the record, I object to His [875a] Honor's ruling, and submit that based upon the argument, the facts and the law as argued, the plaintiff has established a prima facie case.

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